North Hills Office Services, Inc. *and* Local 32B-32J, Service Employees International Union, AFL–CIO, CLC. Case 22–CA–26250

April 18, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 7, 2005, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified below.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North Hills Office Services, Inc., Woodbury, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c):

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

[1] *Postal Service*, 204 NLRB 292 (1973), the principal case cited by the Respondent in support of its argument of unilateral mistake, is distinguishable from the circumstances of this case. In *Postal Service*, the Board set aside, on the ground of unilateral mistake, an agreement on vacation request procedures where the union misrepresented critical facts in its discussions with the employer's representative and the employer's representative would not have accepted the union's offer absent the misrepresentation. No evidence of this character is present in this case.

We amend the judge's remedy to provide that backpay shall be computed in the manner provided in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than *F. W. Woolworth Co*., 90 NLRB 289 (1950). The *Ogle Protection* formula applies when, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, supra, at 683; see also *Pepsi-America, Inc.*, 339 NLRB 986 fn. 2 (2003).

We shall also modify par. 2(c) of the judge's recommended Order in accordance with *Ferguson Electric, Inc*., 335 NLRB 142 (2001).

Dated, Washington, D.C. April 18, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Robert Gonzalez, Esq., for the General Counsel.
Alan Pearl, Esq. (Portnoy Messinger Pearl & Associates, Inc.,) of Syosset, New York, for Respondent.
Katchen Locke, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on September 28, 2004. A complaint issued on June 15, 2004, based upon an unfair labor practice charge filed by Local 32B-32J, Service Employees International Union, AFL–CIO, CLC (Charging Party or Union) on March 3, 2004 against North Hills Office Services (Respondent). On the day of the hearing, counsel for the General Counsel filed a first amended complaint after having previously served on all parties a notice of intent to amend. The first amended complaint was allowed without objection.

It is alleged that on December 9, 2003, Respondent proposed to increase the wages of all employees employed at the Meadows Office Complex located at 201/301 Route 17 North, Rutherford, New Jersey (201/301) by 35-cents-per-hour. Ten days later, by voicing no objection to the proposed increase, the union agreed. Thereafter, Respondent increased the wages of full-time employees by 35 cents, but increased the wages of the part-time employees by only 15 cents. Respondent claims that it always intended to implement a two-tiered wage increase but its negotiator made a mistake and conveyed to the union an offer of a uniform increase for both full-time and part-time employees. Respondent further claims that the union was on notice of this unilateral mistake and therefore there was no enforceable agreement.

FINDINGS OF FACT

I. JURISDICTION

North Hills is a corporation with a main office located in Woodbury, New York. It is engaged in the provision of commercial building cleaning services in the New York/New Jersey metropolitan area, including two office buildings located at 201/301. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Prior Board Proceedings

The events of this case arose during the pendency of another case before the Board involving the same parties. It is helpful to briefly review the chronology of the earlier case in order to put the events of this case into context.

In September and November 2002, and in January 2003, the union filed unfair labor practice charges and amended charges against Respondent alleging that Respondent was a successor employer to a company called Harvard Maintenance, Inc. at 201/301, that it had unlawfully refused to recognize and bargain with the union as the representative of the employees at 201/301, and that it had unlawfully extended its company-wide agreement with the National Organization of Industrial Trade Unions (NOITU) to these employees.[1]

On July 22, 2003, United States District Court Judge Joseph Greenaway issued an order granting the acting Regional Director's request for a temporary injunction pending final disposition of the ULP charges. Judge Greenaway enjoined Respondent, in relevant part, from recognizing and bargaining with NOITU for the employees of 201/301, from applying or enforcing the terms of the NOITU collective-bargaining agreement to the employees of 201/301, and from refusing to bargain with the union for the employees at 201/301.

On February 2, 2004, I issued a decision and recommended order in *North Hills Office Services*, JD-7-04.

On July 9, 2004, the Board issued its decision and order, reported at 342 NLRB No. 25 (North Hills I). The Board determined that on August 31, 2002, Respondent became a successor employer of the employees at 201/301, and that since September 20, 2002, Respondent had an obligation to recognize and bargain with the union in the following appropriate unit:

> All full-time and regular part-time building service employees employed at the Meadows Office Complex located at 201/301 Route 17 North, Rutherford, New Jersey site, but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

The Board ordered Respondent, in relevant part, to withhold recognition from NOITU as the representative of the employees at 201/301 until such time as NOITU was certified by the Board, and to cease and desist from giving force and effect to its collective-bargaining agreement with NOITU with respect to the employees at 201/301. The Board further ordered Respondent, on request, to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees at 201/301.

Respondent and the Union commenced negotiations for a collective-bargaining agreement for the employees at 201/301 in August 2003, 1 month after the issuance of the temporary injunction by Judge Greenaway and prior to the Board's decision in North Hills I.

B. Collective Bargaining from August to December 2003

From August to December 2003, the parties met on a monthly basis. At the initial bargaining session in August 2003, Murray Portnoy,[2] Respondent's representative, responded to an information request previously made by the Union by providing Goldman with a copy of the contract between Respondent and Linque Management, the managing agent for 201/301. Exhibit A of the Linque contract was a pricing list that contained the monthly charges for different job classifications. Exhibit A also contained the following language: "Annual union increases for full-time porters, full-time matrons, full-time lead personnel and part-time employees shall be absorbed by the client." Goldman immediately observed that the specific dollar amounts for labor costs had been redacted and he asked Murray Portnoy to provide the Union with an unredacted copy of Exhibit A. Murray Portnoy responded that the redacted information was none of the Union's business.

Goldman testified, without contradiction, that early on in negotiations he had a copy of the NOITU agreement which provided NOITU with plant visitation rights. He requested the Union be granted similar access to employees. Murray Portnoy responded that if the Union wanted the NOITU agreement, it could get the entire agreement, but he would not agree to parse out portions of the agreement on an interim basis. Murray Portnoy said that the access issue would not be determined until an overall agreement was reached. Murray Portnoy did not testify.

The NOITU agreement provided for annual wage increases of 35 cents for full-time employees and 15 cents for part-time employees to be effective on November 24 of each contract year, i.e. November 24, 2000, November 24, 2001, and November 24, 2002.

It is not disputed that from August to December the parties focused primarily on noneconomic issues in their negotiations. The Union made a wage proposal at the October 31, 2003 session, but it was not discussed in detail and there was no counterproposal by Respondent.

C. Portnoy's December 9, 2003 Letter

On December 9, 2003, Portnoy sent a letter to Goldman stating as follows:

> It has been brought to my attention that our contract with the building in the Meadowlands requires a raise of 35-cents-per-hour to be provided to our maintenance employees. We intend to institute this raise on Monday morning, January 5, 2004 retroactive to November 1, 2003. However, we are prepared to meet to discuss this issue at your convenience . . . If we do not hear from you within the next ten calendar days, we will assume that you and the Union have no objection to the bargaining unit employees receiving this raise.

Following his receipt of the letter, Goldman consulted with Kevin Brown, the Union's New Jersey District chairperson. They decided the Union would not oppose the wage increase. Goldman did not affirmatively respond to Portnoy's December 9, 2003 letter, and let the 10-day period expire without communicating an objection.

When asked about the circumstances which led him to write the December 9, 2003 letter, Portnoy testified that at some point it came to attention that Respondent was going to grant a wage increase to the employees at 201/301 pursuant to the terms of the NOITU agreement. Portnoy could not recall who advised him of the intended wage increase or exactly when he

[1] The NOITU agreement at issue was effective by its terms from October 18, 2000 to November 23, 2003 and covered all of Respondent's employees at all locations.

[2] Murray Portnoy and Mark Portnoy are partners and both represent Respondent in labor negotiations. To avoid confusion, I will refer to Murray Portnoy by his full name.

was told. His only recollection was that it was "somebody at North Hill's office. Whoever called to tell me that the raise would have to go, that a raise was due and coming into effect. I asked 'Well, how much are you talking about?' and they told me 35 cents." Portnoy did not explain during his testimony why he cited the provisions of the Linque contract in his letter to the Union as the reason for the proposed increase rather than the terms of the NOITU agreement.

D. Collective Bargaining from January to February 2004

The next bargaining session was held on January 26, 2004. Present were Goldman, Brown, and Portnoy. Portnoy was asked if the 35-cent increase had been implemented. According to Goldman, Portnoy responded that "all of the minimums" had been increased by 35 cents. Portnoy, on the other hand, testified that he responded that he didn't know and would have to check. Brown asked if new employees would be the beneficiaries of the increases, and Portnoy testified that he responded, "everybody would be the beneficiary because they would establish the new minimums." Goldman asked for proof that the 35-cent wage increase had been put into effect and Portnoy said that would not be a problem.

The next bargaining session was held on February 17, 2004, and Goldman, Brown, and Portnoy were present. Goldman and Brown again requested to see documentation relating to the wage increase. Portnoy had a seniority list for the employees at 201/301, but there was no information contained in the document relating to the wage increase. The meeting adjourned briefly and Portnoy called Respondent. When the meeting reconvened, Portnoy produced an annotated version of the seniority list that had been faxed to him during the break. The annotated document contained a handwritten notation indicating that on January 1, 2004, full-time employees had been given a 35-cent increase and part-time employees had been given a 15-cent increase.

According to Goldman, Portnoy had no immediate explanation for the different treatment of full-time versus part-time employees and he asked for a caucus so he could again talk to his client by telephone. According to Goldman, when the parties returned from the break, Portnoy stated that there might have been a mistake. He said the Linque contract provided for different wage increases for full-time versus part-time employees and that is why the full-time employees received a 35-cent increase and part-time employees only a 15-cent increase. Goldman immediately objected and demanded that the 35-cent increase be extended to all employees. He also said he would file charges with the Board if Respondent did not extend the raise to all employees. According to Goldman, at no time during this or any other negotiating session did Portnoy ever say that the wage increase was being given pursuant to the NOITU agreement.

Portnoy testified that when he received the annotated version of the seniority list with the wage increase information he realized that the wage increase he had previously said had gone into effect did not reflect what actually happened. He told Goldman and Brown, "I may have made a mistake in the information that I gave you. Something different happened." Brown said that he thought all the employees got the same 35-cent increase and Portnoy said, "That's not what was called for." According to Portnoy, neither Brown nor Goldman asked what he meant by the phrase, "what was called for," and he did not elaborate further. According to Portnoy, he did not reference either the Linque contract or the NOITU agreement as the basis for the wage increase.

On April 23, 2004, Portnoy addressed a letter to the investigating Board agent which stated in relevant part:

> Apparently I misunderstood what was requested with respect to the increases at the Meadowlands and I mistakenly informed the Union about what had happened in my letter. When I realized that in fact the increases would be put into effect at the beginning of 2004 and that they were different for full-time and part-time employees, I informed the Union.

Portnoy also acknowledged during his testimony that he had made a mistake:

> Q: So it's clear then, when you made your official offer back on December 9, 2003 to the union you had it in your mind that all the employees would be getting this 35-cent wage increase?
> A: I did, yes.
> Q: Okay, and it wasn't until February 17th that you became aware from your client that, in fact, they really intended 35 cents to full-time and the 15-cent increase to apply to part-time?
> A: Yes.

IV. ANALYSIS

It is well established that the formation of a binding contract may be affected by a mistake. In the case of unilateral mistake, there is considerable authority to the effect that if in the expression of the intention of one of the parties to an alleged contract there is error, and that error is unknown to and unsuspected by the other party, that which was so expressed by the one party and agreed to by the other is a valid and binding contract which the party not in error may enforce. A party to a contract cannot avoid it on the ground that he made a mistake where the other contractor has no notice of such mistake and acts in perfect good faith. *Health Care Workers Union, Local 250*, 341 NLRB No. 137 (2004), slip op. at p. 6; *Apache Powder Co*., 223 NLRB 191 (1976).

Counsel for the General Counsel does not dispute that Portnoy was genuinely mistaken when he conveyed the proposal to increase all employees wages by 35-cents-per-hour rather than 35 cents for full-time employees and 15 cents for part-time employees. The sole issue is whether, under the circumstances, the Union was placed on notice of Portnoy's mistake.

During the 4 months of bargaining that preceded the December 9, 2003 letter, the parties were focused on noneconomic issues. The Union did make an initial wage proposal on October 31, but that proposal was not discussed in detail and Respondent made no counterproposal. Given this backdrop, the Union had no reason to think that Portnoy's letter of December 9, 2003 was anything other than what it purported to be: a proposal to implement a modest interim wage increase pending the negotiation of a global collective-bargaining agreement.

The sole reason cited by Portnoy in the December 9, 2003 letter for the wage increase was a requirement in the Linque contract that employees receive a 35-cent raise. I credit Goldman's testimony that Portnoy advanced the same reason at the February 2004 bargaining session. The Union had previously requested a copy of the Linque contract, and Respondent had provided a redacted version. The redacted version omitted the labor cost information upon which employee wage rates were obviously based. Thus, Respondent withheld from the Union

the very information from which the Union might have been able to determine what wage increases, if any, were due employees. The Union's acceptance of Portnoy's representation of what the Linque contract provided for was therefore perfectly reasonable.

Respondent, in its opening statement, and Portnoy in his testimony, stated that the NOITU agreement called for a raise on November 1, 2003 of 35 cents for full-time employees and 15 cents for part-time employees, and it was pursuant to this mandated contractual increase that Portnoy wrote the December 9, 2003 letter. Respondent concedes that Portnoy was mistaken when he wrote that the increase was 35-cents for all employees, but argues that because the Union was in possession of the NOITU agreement, as well as Exhibit A of the Linque agreement that provided that all union increases would be paid for by Linque, the Union should have recognized Portnoy's mistake. I disagree for the following reasons:

First, Portnoy stated in his December 9, 2003 letter that the Linque contract was the basis for the wage increase, not the NOITU agreement.

Second, I credit Goldman's testimony that at the February 17, 2004 bargaining session, Portnoy again said that it was the Linque contract that was the basis for the wage increase. I credit Goldman's testimony that at no time during negotiations did Portnoy ever cite the NOITU agreement as the basis for the proposed wage increase. His testimony is corroborated by the fact that Portnoy made no mention of the NOITU agreement in his position letter to the Board in April 2004. In fact, it appears the first time Respondent expressed its reliance on the terms of the NOITU agreement as the rationale for the proposed wage increase was at this hearing.

Third, even if the wage increase was premised on the NOITU agreement, that agreement expired by its terms on November 23, 2003, and contrary to Respondent's assertions, did not provide for a wage increase on November 1, 2003. The last wage increase provided for in the NOITU agreement was on November 24, 2002.

Fourth, early in negotiations when the Union asked for access to employees at the worksite, Murray Portnoy made it clear that Respondent would not agree to the partial implementation of any of the provisions of the NOITU agreement. His blanket statement could reasonably have been interpreted by the Union to include any provision for a wage increase under the NOITU agreement. As Goldman testified, Murray Portnoy made it clear that the NOITU agreement "was basically irrelevant."

Finally, and perhaps most significantly, Respondent had been enjoined from enforcing any of the terms of the NOITU agreement with respect to the employees at 201/301.

Given all of these factors, there is no basis upon which to conclude that the Union should have realized that Respondent intended to implement a two-tiered wage increase instead of an across-the-board increase as stated unequivocally in Portnoy's December 9, 2003 letter. I find that on December 9, 2003, Respondent's agent made an unequivocal offer to increase wages for all employees at 201/301 by 35 cents and that, on December 19, 2003, by virtue of not registering an objection, the Union accepted that offer. There was a meeting of the minds on this interim wage agreement. Respondent's refusal to thereafter implement the agreement based upon the unilateral mistake of its agent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time building service employees employed at the Meadows Office Complex located at 201/301 Route 17 North, Rutherford, New Jersey site, but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

4. Since August 31, 2002, the Union has been the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. On December 19, 2003, Respondent and the Union reached an agreement to increase wages for all full-time and regular part-time unit employees by 35-cents-per-hour.

6. Since December 19, 2004, Respondent North Hills has violated Section 8(a)(5) and (1) of the Act by failing and refusing to implement the agreed upon wage increase for the part-time unit employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must implement the agreed upon 35-cents per-hour wage increase for the part-time unit employees. Respondent must also make these employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unfair labor practice. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

Respondent North Hills, Woodbury, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to implement the 35-cents per-hour wage increase for part-time unit employees as agreed to by Respondent and the Union.

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[3] It is not clear if the wage increase for full-time employees was implemented on November 1, 2003, as indicated in Portnoy's letter, or on January 1, 2004, as indicated on the document presented by Portnoy at the February 17, 2004 bargaining session. Whatever the date, the part-time employees are entitled to the same increase as that received by the full-time employees, and the effective date of that increase should be determined at the compliance stage.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Implement the agreed upon 35-cents per-hour wage increase for the part-time unit employees.

(b) Make the part-time employees whole for any loss of earnings and other benefits suffered in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its 201/301 site in Rutherford, New Jersey copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent North Hills' authorized representative, shall be posted by Respondent North Hills immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent North Hills to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent North Hills has gone out of business or closed the facility involved in these proceedings, Respondent North Hills shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent North Hills at that location at any time since December 19, 2003.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent North Hills has taken to comply.

Dated, Washington, D.C., January 7, 2005.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to implement a 35-cents-per-hour wage increase for part-time employees agreed to by us and Local 32B-32J, Service Employees International Union, AFL–CIO, CLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL implement a 35-cents-per-hour increase for part-time employees as agreed to by us and Local 32B-32J, Service Employees International Union, AFL–CIO, CLC.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of our failure to implement the 35-cents-per-hour increase for part-time employees.

NORTH HILLS OFFICE SERVICES, INC.